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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FIRST AFG FINANCIAL CORPORATION,

Plaintiff and Respondent,

v.

SECURITY UNION TITLE INSURANCE COMPANY,

Defendant and Appellant.

G046179

(Super. Ct. No. 07CC05856)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Sheila Fell, Judge. Reversed with directions.

Rutan & Tucker, Milford W. Dahl, Jr., and Gerard M. Mooney, Jr., for Defendant and Appellant.

O'Neil & Matusek and Henry John Matusek II for Plaintiff and Respondent.

In a nonpublished opinion, *First AFG Financial Corporation v. Security Union Title Insurance Company* (Dec. 8, 2010, G042855) (*First AFG I*), we reversed the trial court's entry of judgment in favor of First AFG Financial Corporation (First AFG), arising out of First AFG's breach of contract and negligence causes of action against Security Union Title Insurance Company (Security Union), in a dispute over the recording of documents. We concluded insufficient evidence supported the trial court's finding (1) there was a contract between First AFG and Security Union, and (2) Security Union owed a duty of care to First AFG.

On remand, the trial court set a trial date but then entered a revised judgment in favor of Security Union. The trial court later granted First AFG's motion to vacate the revised judgment. The court then granted First AFG's ex parte application to file a first amended complaint. Security Union appeals from the trial court's order granting First AFG's motion to vacate the revised judgment.

In its opening brief, Security Union argues the trial court erred in granting the motion to vacate the revised judgment because: (1) the court had the authority to enter the revised judgment; (2) retrial after an appellate court reversal based on insufficient evidence is prohibited; and (3) First AFG's two new causes of action are barred by the "law of the case" doctrine.

In its respondent's brief, First AFG contends: (1) the November 2011 order Security Union appeals from is a nonappealable order; (2) any appeal from the June 2011 order is untimely; (3) the June 2011 judgment is null and void because it violated First AFG's due process rights; and (4) the court's June 2011 order setting a new trial was proper.

In its reply brief, Security Union asserts: (1) the November 2011 order was an appealable order; (2) First AFG's due process rights were not violated by entry of the revised judgment; and (3) the court's granting of First AFG's motion to vacate was erroneous.

We conclude First AFG's due process rights were violated when the trial court entered the revised judgment but First AFG was not prejudiced. As we also explain below, we agree with Security Union that the trial court erred in granting First AFG's motion to vacate the revised judgment. We reverse the order and remand the matter to the trial court and direct the trial court to enter judgment in favor of Security Union.

FACTS

Underlying Factual Dispute

The underlying facts are fully set forth in our prior nonpublished opinion *First AFG I, supra,* G042855. We need not repeat them here.

Our First Opinion

In December 2010, we filed our opinion reversing the trial court's judgment in favor of First AFG. As to First AFG's breach of contract cause of action, we stated: "Here, the parties to the escrow were the borrower, [Lorece] Wright, and the lender, Long Beach Mortgage, and the escrow holder was Priority Escrow. First AFG makes much of the fact it hired Security Union, but Security Union was not a party to the escrow—it provided sub-escrow and title services. The evidence at trial established sub-escrow services included making payoffs and recording the documents. Additionally, there was testimony there was no written contract between the escrow company, Priority Escrow, and the title company, Security Union. [¶] There was testimony from [Jeff] Allen, the Security Union title officer responsible for the refinance, that Security Union's file included both the October 23, 2003, and November 14, 2003, 'Payoff Demand' letters. But these demand letters were addressed to Priority Escrow, the escrow holder, and agent to the escrow parties, Wright and Long Beach Mortgage. First AFG's 'Payoff Demand' letters instructed Priority Escrow how to prepare the reconveyances. The 'Payoff Demand' letters that were from First AFG and addressed to Priority Escrow did not establish a contract between First AFG and Security Union. Additionally, they did not

constitute escrow instructions to Security Union. Although there was evidence Allen should have caught the discrepancies, Allen testified he performed the closing services based upon the reconveyances that were submitted to him, and not the 'Payoff Demand' letters. [¶] . . . [¶] The present situation is similar because Security Union was not a party to the escrow, and there was evidence Security Union was responsible for recording the documents Priority Escrow submitted to Security Union to perform its sub-escrow function. Security Union carried out its sub-escrow duties in accordance with the reconveyance documents provided to it by the escrow company, Priority Escrow. Therefore, we conclude the trial court erroneously concluded Security Union breached a written agreement with First AFG." (*First AFG I, supra*, G042855, at slip opinion pp. 10-12.)

With regard to First AFG's negligence cause of action, we relied on *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 707-709. We stated: "The facts here are similar to *Summit* as Security Union was not a party to the escrow. Therefore, Security Union did not owe a duty of care to First AFG, and Security Union is not liable to First AFG under a negligence theory." (*First AFG I, supra*, G042855, at slip opinion p. 14.)

On December 30, 2010, we denied First AFG's petition for rehearing. The California Supreme Court denied First AFG's petition for review on March 16, 2011.

PostAppeal Proceedings

In April 2011, the trial court set a postappeal status conference for May 4, 2011. At the May 4, 2011, status conference, Security Union indicated it would submit a new judgment for the trial court's review and signature. Counsel for First AFG was not present. The court continued the status conference.

In preparation for the status conference, Security Union filed a status conference report. The report was supported by multiple exhibits, including a revised

judgment. Security Union acknowledged the general rule retrial is appropriate after a reversal without directions but argued we expressed our contrary intent when we held there was no contract between First AFG and Security Union, and Security Union did not owe a duty of care to First AFG.

First AFG filed an "Objectio[n] to Proposed Judgment and Status Conference Report." First AFG contended the general rule of retrial upon reversal without directions is appropriate. First AFG contended the "'law of the case'" doctrine is limited to our holding no contract existed between First AFG and Security Union, and Security Union did not owe a duty of care to First AFG. First AFG contended it would produce "new evidence," and "new law," at retrial establishing it was a third party beneficiary of the contract between Wright, Long Beach Mortgage, and Security Union. The new evidence First AFG cited to was trial exhibit No. 1, and Allen's testimony. First AFG also contended "[t]he undisputed facts are" Security Union breached its fiduciary duty to First AFG.

Security Union filed a reply, arguing First AFG misstated the evidence, and the undisputed evidence contradicted First AFG's new legal theories.

Two days later, on June 9, 2011, the trial court conducted a status conference. At the conference, First AFG indicated this court reversed the judgment "without instructions . . . so the rule should be retrial." Security Union's cocounsel argued retrial was inappropriate in this case because the court should apply an exception to the general rule allowing retrial. First AFG agreed with the trial court that it should set a trial date. Security Union argued a retrial was not necessary but stated "we could go ahead and set a trial date . . . ." Security Union inquired what was the best method "to go about deciding that before we go ahead." The court replied it could set a trial date and Security Union could file a motion on this issue. When Security Union mused what type of motion it would bring, the trial court stated, "You know what? You file it and I'll read

it." The court set a trial date for October 11, 2011. The trial court issued a minute order reflecting the trial date of October 11, 2011, that First AFG waived jury trial, and trial was estimated to be two days.

Two weeks later, on June 23, 2011, the trial court entered a "Revised Judgment After Appeal." The court ruled: "1. . . . First AFG, . . . has [j]udgment against defaulted . . . Priority Escrow, . . . in the sum of $1,030, 000.00 plus interest at the lawful rate of 10 [percent] per annum from November 1, 2005. [¶] 2. . . . First AFG, . . . takes nothing on its Complaint from . . . Security Union . . . . [¶] 3. [First AFG] is the prevailing party as to . . . Priority Escrow . . . . [¶] 4. . . . Security Union . . . is the prevailing party as to . . . First AFG." Security Union gave "Notice of Entry of Judgment" almost three months later, on September 15, 2011.

On October 18, 2011, pursuant to Code of Civil Procedure section 473, subdivision (b), First AFG filed a motion to vacate the June 23, 2011, judgment based on surprise, and requested permission to file an amended complaint alleging two new causes of action: breach of fiduciary duty and breach of contract as a third party beneficiary. First AFG argued the revised judgment was void *ab initio* because the trial court entered it without notice or an opportunity to be heard. First AFG also argued the general rule is that retrial is appropriate where the appellate court reverses without directions. Referencing the attached first amended complaint, First AFG asserted two new causes of action: (1) breach of fiduciary duty; and (2) breach of contract for the benefit of a third party beneficiary. First AFG asserted the undisputed facts were Security Union "was the escrow" and breached its escrow duties. First AFG also asserted trial exhibit No. 1 and Allen's testimony established First AFG was a third party beneficiary of the written escrow instruction from Long Beach Mortgage to Security Union.

Security Union opposed First AFG's motion to vacate the judgment. Security Union contended the "'law of the case' doctrine" barred First AFG's new causes

of action because it presented no new or different facts. Security Union noted no new evidence accompanied First AFG's first amended complaint. Security Union also asserted First AFG had sufficient notice and an opportunity to be heard. It cited to First AFG's status conference brief and the June 9 status conference where First AFG argued retrial was the general rule. First AFG replied.

The hearing on First AFG's motion to vacate the judgment was held in November 2011. The trial court heard counsels' arguments and took the matter under submission. Security Union's cocounsel argued the tentative opinion did not address any of the exceptions to the general rule that retrial is appropriate after a reversal without directions. Security Union argued the "'law of the case'" doctrine barred retrial. First AFG responded: "[T]he law of the case applies to the facts, it doesn't apply to the legal theories. We are dealing with different legal theories here. [¶] And also law of the case only applies to the facts if the facts are the same, but if you've got new theories, the new facts and any new additional facts cause a reweighing of all of the old facts in the new trial." The trial court took the matter under submission.

On November 16, 2011, the trial court issued a minute order granting First AFG's motion. The court stated: "The [c]ourt having reviewed the pleadings filed in this matter, having heard oral argument, having reviewed applicable law, and having taken [First AFG's] Motion to Set Aside/Vacate the Judgment under submission on November 9, 2011, now rules as follows: The [c]ourt finds no reason to change its tentative ruling. The reversal without direction vacates the appealed [j]udgment or [o]rder. This includes the right to amend the pleadings to raise new issues. The proposed new causes of action . . . are sufficiently different from the original theories to allow the new [c]omplaint to go forward on the new theories. [First AFG's] motion is granted."

First AFG filed an ex parte application to file a first amended complaint. On December 5, 2011, the trial court granted First AFG's ex parte request and deemed the first amended complaint filed that date. First AFG's first amended complaint alleged the following two causes of action against Priority Escrow and Security Union: (1) breach of fiduciary duty by escrow holder; and (2) breach of contract [third party beneficiary].

On December 7, 2011, Security Union filed a notice of appeal. Security Union "hereby appeals from the final order (the 'Order') entered on November 16, 2011[,] setting aside/vacating the judgment (the 'Judgment') of the [c]ourt entered on June 23, 2011, and any orders made appealable thereby."

DISCUSSION

I. Statement of Appealability

First AFG argues Security Union appeals from a nonappealable order, the trial court's November 16, 2011, minute order granting its motion to vacate the revised judgment. We disagree.

"It is well established that a direct appeal may be taken from an order granting a statutory motion to set aside a . . . judgment [citation] so long as the underlying judgment sought to be vacated is an appealable final judgment [citation] and is not conditioned on a second order unconditionally vacating the judgment. [Citation.]" (*Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 628-629; *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 680; *County of Ventura v. Tillet* (1982) 133 Cal.App.3d 105, 110-111, disapproved on another ground in *County of Los Angeles v. Soto* (1984) 35 Cal.3d 483, 492, fn. 4; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 194, pp. 271-272.)

The order vacating the revised judgment as to First AFG satisfies the requisite criteria. Clearly, the reason First AFG sought to vacate the revised judgment

was to prevent enforcement of the judgment against it. At that point in the proceeding, there was nothing left to be decided. The revised judgment was an appealable final judgment, and thus, the order vacating the judgment is appealable.

First AFG relies on *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 652 (*Lakin*), and *Carr v. Kamins* (2007) 151 Cal.App.4th 929, 933 (*Carr*), to argue the revised judgment was void *ab initio* and Security Union could not appeal from a void judgment. *Lakin, supra,* 6 Cal.4th at page 652 is inapposite as it involved a postjudgment motion for attorney fees and not a motion to vacate a judgment. First AFG's reliance on the below italicized language from *Carr* does not help it either.

The *Carr* court explained: "If a judgment is void, an order giving effect to the void judgment is subject to appeal even if the underlying judgment was also appealable. (*County of Ventura v. Tillett, supra,* 133 Cal.App.3d 105, 110 . . . .) 'A judgment is void on its face if the court which rendered the judgment lacked personal or subject matter jurisdiction or exceeded its jurisdiction in granting relief which the court had no power to grant. [Citations.]' [Citation.] *An order after judgment that gives effect to a judgment that is void on its face is itself void* and subject to appeal even if the judgment itself is not appealed. [Citations.] The order denying appellant's motion to vacate the judgment is therefore appealable." (*Carr, supra,* 151 Cal.App.4th at pp. 933-934, italics added.) *Carr* is inapposite as the trial court granted First AFG's motion to vacate the revised judgment and there is no order giving effect to a void judgment. Therefore, Security Union properly appealed from the trial court's order granting First AFG's motion to vacate the revised judgment.

II. Entry of the Revised Judgment

First AFG contends the revised judgment was void because the trial court entered the revised judgment without notice and an opportunity to be heard. We agree the court should have given First AFG an opportunity to be heard before it reversed itself, but we discern First AFG was not prejudiced by this error.

"Unless the requirements of [Code of Civil Procedure] section 437c, subdivision (f)(2), or 1008 are satisfied, any action to reconsider a prior interim order must formally begin with the court *on its own motion*. To be fair to the parties, if the court is seriously concerned that one of its prior interim rulings might have been erroneous, and thus that it might want to reconsider that ruling on its own motion—something we think will happen rather rarely—it should inform the parties of this concern, solicit briefing, and hold a hearing. [Citations.] Then, and only then, would a party be expected to respond to another party's suggestion that the court should reconsider a previous ruling. This procedure provides a reasonable balance between the conflicting goals of limiting repetitive litigation and permitting a court to correct its own erroneous interim orders." *(Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1108-1109.)

"It is a fundamental principle of appellate review that we presume that a judgment or order is correct. [Citation.] Moreover, it is the appellant's burden of providing a record that establishes error, and where the record is silent, we must indulge all intendments and presumptions to support the challenged ruling. [Citations.] From these principles, courts have developed the doctrine of implied findings by which the appellate court is required to infer that the trial court made all factual findings necessary to support the order or judgment. [Citations.]" (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1271-1272.) The doctrine of implied findings applies to minute orders. (*Ibid*.) We review the trial court's ruling de novo. (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496.)

Here, the trial court issued a minute order on June 9, 2009, after the status conference. The minute order set a trial date of October 11, 2011, and stated First AFG waived jury trial and trial was estimated to be two days. Although the trial court did not expressly discuss the general rule favoring retrial after reversal without directions in its minute order, the court's ruling conformed to the general rule, and we imply from the

minute order the court concluded the general rule applied and not the exceptions we discuss below. At the status conference, the court informed Security Union's cocounsel that it would entertain any motion asserting retrial was inappropriate and the court should enter judgment in Security Union's favor.

About two weeks later, however, without any notice to the parties or further written submission from the parties, the trial court entered a revised judgment in favor of Security Union. The court's entry of judgment conflicts with its prior interim order that retrial was appropriate, and it was incumbent upon Security Union to demonstrate one of the exceptions to the general rule favoring retrial was applicable. But Security Union did not file a subsequent motion. We can only assume the trial court subsequently reviewed the status conference reports and concluded retrial was unnecessary.

First AFG's contention the trial court entered the revised judgment without notice or further opportunity to be heard is well taken. But we are not sure what was left to be said on the issue. The general rule is that "[t]he effect of an unqualified reversal ('the judgment is reversed') is to vacate the judgment, and to leave the case 'at large' for further proceedings as if it had never been tried, and as if no judgment had ever been rendered. [Citations.]" (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 869, p. 928.) "An unqualified reversal ordinarily has the effect of remanding the cause for a new trial on all of the issues presented by the pleadings. It is unnecessary to add specific directions for this purpose in the judgment [on appeal]." (9 Witkin, *supra*, § 870, p. 929; *McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1662; *Bank of America v. Superior Court* (1990) 220 Cal.App.3d 613, 620-621; *Stromer v. Browning* (1968) 268 Cal.App.2d 513, 518-519.)

However, "'When the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff's cause of

action, a judgment for defendant is required and no new trial is ordinarily allowed, save for newly discovered evidence. . . . Certainly, where the plaintiff's evidence is insufficient as a matter of law to support a judgment for plaintiff, a reversal with directions to enter judgment for the defendant is proper. . . . [¶] . . . [A] reversal of a judgment for the plaintiff based on insufficiency of the evidence should place the parties, at most, in the position they were in after all the evidence was in and both sides had rested.' [Citations.] In another context, our Supreme Court explained in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 214, that '[f]or our justice system to function, it is necessary that litigants assume responsibility for the complete litigation of their cause during the proceedings.'" (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919 (*Kelly*); *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 833-834.)

Here, First AFG had a full and fair opportunity to present its case in the first trial. As we explain below more fully, First AFG offers no newly discovered evidence supporting a new trial either below or on appeal. To the extent First AFG claims that had the trial court given the parties notice it intended to enter the revised judgment First AFG could have submitted new evidence, that claim is belied by the record. As we discuss anon, First AFG provided no *new* evidence. Although we agree the trial court should have given First AFG notice of its intent to change its ruling, the record does not indicate First AFG could have met its burden to demonstrate a new trial was justified.

III. Motion to Vacate

Security Union argues the trial court abused its discretion in granting First AFG's motion to vacate the revised judgment. We agree.

In our prior opinion we concluded insufficient evidence supported the trial court's finding (1) there was a contract between First AFG and Security Union, and (2) Security Union owed a duty of care to First AFG. In its first amended complaint,

First AFG alleges two "new" causes of action, breach of fiduciary duty and breach of contract as a third party beneficiary. But First AFG offers no newly discovered evidence to support these causes of action. Indeed, First AFG recognizes this fact throughout its respondent's brief. First AFG states the following: "These facts and theories though presented in the underlying trial and argued in the subsequent appeal[]" were neither decided by the trial court in the underlying litigation of the first appeal nor decided by this court in *First AFG I, supra,* G042855; "[First AFG] seek[s] remedies based upon different legal theories supported by the same facts[]"; and First AFG claims its new legal theories and factual allegations "have evidentiary support already appearing in the record." We review an order granting a motion to vacate a judgment for an abuse of discretion. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.)

In its status conference report, motion to vacate, and respondent's brief, First AFG cites to evidence that was admitted at the first trial. First AFG cites to the "undisputed" facts, Woodbury's testimony, Allen's testimony, and trial exhibit No. 1. The trial court heard Woodbury's and Allen's testimony in the first trial. (*First AFG I, supra,* G042855, at Slip Opinion pp. 5-6.) And trial exhibit No. 1 was admitted into evidence.[1]

First AFG cites to one new piece of evidence—First AFG was the loan broker and was paid more than $10,000 out of escrow. But First AFG certainly knew this and knew of its role when it litigated the first case. This is not new evidence, but instead, evidence known to First AFG that it should have offered at the first trial. (*Kelly, supra,* 145 Cal.App.4th at p. 919 [parties must "'assume responsibility for the complete litigation of their cause during the proceedings'"].)

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[1] We grant Security Union's request to take judicial notice of the record in the prior appeal. (See Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

We recognize there is legal authority for the proposition a party may amend its pleadings on retrial, but the party seeking retrial must present newly discovered evidence supporting the new causes of action. (*Kelly, supra,* 145 Cal.App.4th at p. 919.) Here, First AFG has not done that.

DISPOSITION

The order is reversed with directions to enter judgment in favor of Security Union. Appellant shall recover its costs on appeal.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.